

United States
COURT OF APPEALS
for the Ninth Circuit

LOUIE HOY GAY,

Appellant,

vs.

JOHN FOSTER DULLES, Secretary of State of
the United States of America,

Appellee.

APPELLANT'S REPLY BRIEF

*Appeal from the United States District Court for the
District of Oregon.*

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QUESTIONS PRESENTED

The fundamental issues to be determined by this appeal are three, namely:

1. Is appellant Louie Hoy Gay the lawful and natural blood son of Louie Foo?
2. Is Louie Foo a native born citizen of the United States?
3. Did the trial court err in admitting in evidence the Immigration file of plaintiff (appellant), be-

ing Exhibit No. 14, and that portion of Exhibit No. 7, being the testimony of Louie Hoy Gay and his mother, Ng Shee, taken in Hong Kong (Tr. 46, 100, 101, 102, 103, 106, 107, 111, 112 and 114)?

ISSUE NO. 1

Replying to appellee's Summary of Argument stated on page 4 of appellee's brief, to-wit, "that Plaintiff has failed to prove by a preponderance of the evidence that he is the legal and natural son of Louie Foo," we submit to the court the following:

ARGUMENT

We believe that, in our original brief, we have fully met appellant's contention on this issue, wherein we have specifically recited the evidence of a long chain of events and supporting legal authorities, which fully refute the contention of appellee and establishes by a preponderance of the evidence that appellant, Louie Hoy Gay, is the lawful and natural blood son of Louie Foo.

Desiring to avoid repetition, we refer the court to said evidence and authorities contained in our original brief. We desire, however, to add one additional item, as follows:

A blood test was taken of Ng Shee, the mother of Louie Hoy Gay, and Louie Hoy Gay, in China, by Eric Vio, M.D., as indicated by his letter dated September 1, 1952, and contained in Exhibit No. 7. This letter indicates that the blood was compatible between mother and son.

A letter from Arthur W. Frisch, M.D., of the University of Oregon, is contained in Exhibit No. 7, which indicates that the blood type of Louie Foo is compatible with that of his son, Louie Hoy Gay.

ISSUE NO. 2

Is Louie Foo a native born citizen of the United States?

Louie Foo was 72 years old at the date of trial on February 8, 1956, and was born on August 10, 1884 at Portland, Oregon (Tr. 31).

The appellate court will recognize the difficulty of one that age to produce witnesses of actual birth, as such witnesses would have to be approximately 90 years of age (Tr. 49). Even the trial court recognizes this difficulty (Tr. 113, 114). The law requires only that Louie Foo prove by a preponderance of the evidence that he is a citizen of the United States. All decisions which previously placed a greater burden on him, namely, to prove citizenship by clear and satisfactory evidence, have now been overruled (Tr. 114). To prove his citizenship, Louie Foo has, by his testimony, bared in detail the history of his life from his birth at Portland, Oregon on August 10, 1884, to the date of trial on February 8, 1956 (Tr. 31 to 57 inclusive). He has fortified his testimony by ample evidence of witnesses and evidence of a chain of facts and circumstances which, we believe, proves his claim of citizenship by a preponderance of the evidence (Tr. 31 to 57 inclusive).

We urge the court to read Louie Foo's testimony in its entirety.

For the sake of brevity, and in order to avoid repetition, we refrain from repeating much of the testimony, facts and circumstances and the law applicable thereto, contained in our original brief on appeal.

We wish to refer to the statement made in appellee's brief on page 11, as follows:

"A very interesting point presents itself through a question propounded by the court to Mr. Banks when he was making his opening statement (R. 27):

" 'Why was he admitted on those trips as a Chinese merchant, rather than as a citizen?

" 'Mr. Banks: I will tell you why, your Honor. It is because it was much easier for a merchant to go than it was to offer proof of his citizenship, and that is the reason why that was done, but at all times on those two trips and at all times since he has claimed to be a citizen of the United States.' "

The statement by Mr. Banks, just quoted, is very, very true.

The court will observe that a Certificate of Identity issued to Louie Foo by the Immigration officials at Seattle, No. 54325, as a result of an application by Louie Foo to go to and return from China as a merchant pursuant to rules and regulations of the Immigration Department (Tr. 44), under which a Chinese merchant desiring to depart for China could file an application with said department to depart to and return from China, if he was a bona-fide Chinese merchant, and his application be signed by two white witnesses, who had known the applicant for more than one year and that said applicant had done no manual labor, except what was necessary in the conduct of his business.

That was the simple method and justified the statement made by Mr. Banks that the reason why Louie Foo had not made application as a citizen on his two trips to China was that it was easier to go as a merchant, rather than as a citizen. Certificates of identity were issued by the Immigration Department on the return of the applicant such as the one above mentioned.

One has only to reflect the difficulty encountered in the present case to understand the truth of Mr. Banks' statement.

On the question of whether or not Louie Foo has produced sufficient evidence to prove by a preponderance of the evidence that he is a citizen of the United States we place great emphasis on the case of *Chin Wing Dong v. Clark*, 76 F. Supp. 648 (CCA 9), referred to in appellant's original brief at Page 14.

The court will find in that case the testimony, records and exhibits were very similar to those introduced in evidence on behalf of Louie Foo. It is an excellent authority, fully supporting appellant's contention as to citizenship.

Appellee, in his brief at page 14, places great stress on the fact that, on November 30, 1924, and again on December 4, 1924, when Louie Foo returned from China, after making his second trip to that country, he reported that he had another child, whose name was Louie Hoy Park, a son, aged 2 years. At the trial Louie Foo stated:

"I all the time say I got one boy and one girl. That is all. Maybe someone make a mistake."

Bearing on this subject, we call the court's attention to the case of *United States ex rel Fong Lung Sing v. Day*, 26 F. 2d 619. In this case Fung Lung Sing was a native of the United States and made two trips to China and returned, the last trip being in 1911. Upon his entry into the United States in 1911, he testified he had one son. In 1917 Fong Bing Thin applied for entry as the son of Fong Lung Sing. At that hearing the father testified he had four sons. The court said:

"It may be true that false testimony was given by the father at the former hearings in his efforts to obtain the entry of his sons but, assuming such to have been the fact, it would not justify exclusion in this instance if there is some evidence to satisfy a reasonable mind that the relator, claiming rights of American citizenship through the nativity of his father, was entitled thereto."

This case quotes *ex parte Ng Bin Fong*, 20 F. 2d 1014, and *Go Lun v. Nagle*, CCA 9, 34 F. 2d 848, wherein the court, among other things, stated:

"The purpose of the hearing is to inquire into the citizenship of the applicant, not to develop discrepancies which may support an order of exclusion, regardless of the question of citizenship."

ISSUE NO. 3

We direct attention to the statement made in appellee's brief (p. 6) as follows:

"While the testimony of appellant contained in Exhibit 7 to the effect that he was the blood son of Louie Foo, and Louie Foo, at the trial of this cause, gave similar testimony (Tr. 37), *all of which was uncontradicted*, the court below was not required nor did he believe such evidence, nor did he accept it as true." (*Italics ours.*)

At the trial of this case appellant objected to Exhibit No. 14 and that part of Exhibit No. 7 consisting of the testimony taken of appellant and his mother, Ng Shee, in Hong Kong (Tr. p. 46). In this connection appellee states in his brief (p. 5) as follows:

"In rendering his opinion, the court apparently considered all of this record in its entirety, except the questions and answers propounded to plaintiff's alleged mother, Ng Shee. This questioning was determined by the court below to be inadmissible under the rule of *Wong Wing Foo v. McGrath*, 9 Cir. 1952, 196 F. 2d 120."

In the opinion the trial court (Tr. 15) says:

"I have refrained from considering any portion of the Immigration and Naturalization Service files, except for statements made by the plaintiff and documents submitted either by him or on his behalf."

Notwithstanding the above remarks of the trial court just quoted, it is apparent that he did consider the testimony of the mother, Ng Shee, where the court states in his opinion as follows (Tr. 15):

"The only evidence of plaintiff's identity was supplied by his alleged mother and himself in interviews conducted by the Hong Kong Consulate in connection with plaintiff's application for a passport and which are a part of the Immigration and Naturalization file pertaining to plaintiff. They contradicted each other on many facts which should have been common knowledge to both of them. All of this appeared in the questions propounded to plaintiff in the presence of his alleged mother."

It is apparent that the trial court did, in fact, consider the said incompetent and prejudicial evidence in his decision.

CONCLUSION

It is submitted that, from all the evidence in this case, the relationship of father and son has been established between Louie Foo and Louie Hoy Gay, which evidence was uncontradicted by appellee.

It is further submitted that, from all the evidence, Louie Foo is a citizen of the United States.

It is further submitted that the Court erred in admitting into evidence certain documents and testimony previously referred to.

It is further submitted that the Findings and Judgment of the lower court are clearly erroneous and that the judgment therein should be reversed and that appellant be declared to be a United States citizen and/or national.

Dated at Portland, Oregon, May 6, 1957.

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By W. W. BANKS,

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